IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 321 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ? No.

2 To be referred to the Reporter or not ? No.

3 Whether their Lordships wish to see the fair copy of the judgment ? No.

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? No.

5 Whether it is to be circulated to the civil judge ? No.

==========

ARUNKUMAR ARVINDBHAI SANSI - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

==========

Appearance :
MR HG RATHOD for Applicant(s) : 1,
MR. KC. SHAH APP for Respondent(s) : 1,
MR VM PANCHOLI for Respondent(s) : 2,

==========

CORAM : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

: 20/12/2007

ORAL JUDGMENT :

1. Rule. Learned A.P.P. Mr. K.C. Shah waives service of notice of Rule on behalf of respondent No.1 – State. Learned advocate Mr. V.M. Pancholi waives service of notice of Rule on behalf of respondent No. 2.

2. With the consent of the learned advocates for the parties, this application is taken up for final hearing today.

3. The petitioner – husband has filed this Criminal Revision Application under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Cr. P.C.”)and challenged the judgment and order passed on 21-4-2007 by learned Addll Senior Civil Judge and J.M.F.C., Dahod in Misc. Criminal Application No. 130 of 2006 awarding maintenance of Rs.4000/- p.m. from the date of application and costs of Rs.500/- to respondent – wife.

4. The respondent – wife filed application u/s 125 of Cr. P.C. to obtain maintenance alleging that after some time of marriage the petitioner – husband started inflicting physical and mental cruelty by giving abuses and saying that she was always remaining sick and did not bring dowry; that petitioner tried to burn her but the neighbours saved her; that she was admitted in hospital as she

lost mental balance and a complaint was also filed; that she is driven out of the house and the petitioner gave threats to kill her if she returned; that the petitioner is doing business and earning Rs.20,000/- p.m. but has not made any arrangement for her maintenance and has refused and neglected to maintain her; that she has no source of income and is passing dependent life at her parental house.

5. The petitioner resisted the maintenance application by filing written statement denying the accusations made in the application. The petitioner contended that the respondent – wife stayed with him only for six to 8 days and when her mother came to leave her at matrimonial house she tried to commit suicide as she did want to stay with him; that the respondent does not want to reside with him and therefore she is not entitled to claim maintenance.

6. After hearing the parties and appreciating the evidence adduced before it, the trial Court came to the conclusion that the respondent was inflicted cruelty by the

petitioner and the incident of burning was on account of result of such cruelty and the petitioner did not call the respondent and thereby refused and neglected to maintain her. As regards quantum of maintenance the trial Court after assessing the evidence, came to the conclusion that the petitioner is doing business of money lending and there could be no evidence in that regard but he is able bodied person and the respondent would require Rs.3000/- p.m. towards maintenance and as she is undergoing treatment for her burn injuries, she would require about Rs.1000/- p.m. approximately and thereby awarded Rs.4,000/- towards maintenance to the respondent from the date of the application. The Court also awarded costs Rs.500/- to the respondent.

7. Being aggrieved by the said decision, the petitioner has preferred this Criminal Revision Application. The respondent has also filed Criminal Revision Application No.397 of 2007 for enhancement of amount of maintenance awarded by the trial court.

8. I have heard learned advocate Mr. H.G.

Rathod for the petitioner, learned A.P.P. Mr. K.C. Shah for the respondent No.1 – State and learned advocate Mr. V.M. Pancholi for the respondent No.2 at length and in great detail.

9. Learned advocate Mr. Rathod for the petitioner submitted that the respondent has alleged that the petitioner is doing business but no evidence with regard to the business and income is adduced and in absence of evidence with regard to income the impugned order of maintenance could not have been passed. He also submitted that there is no evidence of neglect or refusal to maintain the respondent. Therefore, the learned Magistrate committed error in passing the impugned order of maintenance. He further submitted that while awarding maintenance, the trial court should have considered the fact that the parties are illiterate and belong to lower strata of the society and the petitioner is incapable of earning and has no source of income even to maintain himself and is staying in the temple. He also submitted that while awarding the maintenance the trial court has to consider status of the parties and therefore at the most Rs.1,500/- to Rs.2000/- p.m. could have

been awarded to the respondent, and therefore, the impugned judgment and order is erroneous and perverse and is required to be quashed and set aside. In support of his arguments, he has relied on number of decisions.

10. Learned advocate Mr. V.M. Pancholi for the respondent submitted that the respondent was treated with cruelty and was driven out of the house and the petitioner tried to burn her and as the respondent suffered severe burn injuries she would require to incur expenses for medical treatment and therefore the learned Magistrate was justified in passing the impugned order. He submitted that while exercising revisional powers the scope is very limited and the Court cannot reappreciate the evidence. Therefore, the impugned judgment and order passed by the trial court does not require any interference. He has also relied upon number of decisions

11. In order to prove her case the respondent examined herself and her father Shankarbhai Khamanbhai but did not produce any documentary evidence. Similarly, the petitioner examined

himself only and did not produce any documentary evidence.

12. According to the respondent she was treated with cruelty and driven out of the house.

13. As regards cruelty, there is word against word. The oral evidence indicates that incident of burning had occurred and respondent had sustained burn injuries. It is true that no complaint in that regard was filed but the incident of burning took place within a very short time of marriage and the respondent was treated at her parental house indicates that the petitioner did not want the respondent to reside with him, otherwise petitioner would have made efforts to bring respondent home. It is also pertinent that there is no evidence to show that petitioner tried to bring respondent to reside with him. This conduct of petitioner would amount to cruelty. The trial court has appreciated the evidence in its proper perspective and has come to conclusion that incident of burning was result of cruelty. In the decision of **Premlata Sahai V. Ram**

Niranjan Sahai and Others, reported in **1991 SCC (Cri.) 236,** the Hon'ble Apex Court held that, "**the High Court should have shown better awareness of the plight of women and should not have interfered with an order of maintenance passed in favour of the wife by the trial court in exercise of its revisional jurisdiction.**" Similarly, in the case of **Pathumma and Another V. Muhammad,** reported in **1986 G.L.H. 788,** the Hon'ble Supreme Court held that "**the High Court in revisional jurisdiction was not justified in making reassessment of the evidence and findings of fact by the learned trial Magistrate under S. 125 of the Code ought not be interfered with by the High Court in exercise of its revisional jurisdiction under S. 401 of the Code.**" The learned Magistrate on appreciation of the evidence came to the conclusion that respondent was treated with cruelty and there was neglect and refusal by the petitioner to maintain the respondent. In view of these decisions, this Court while exercising powers u/s 397 read with Section 401 of the Cr. P.C., cannot reappreciate the evidence. Similarly, the finding with regard to income of petitioner is also based on the material

produced before the court. The petitioner has in his written statement not stated that he is staying in temple. It appears that the petitioner has tried to change his defence by deposing that he has no income and is staying in temple. The petitioner has not shown income with a view to avoid liability to pay maintenance and defence of staying at temple is raised at the time of oral evidence. Therefore, the defence is not bonafide and is raised only with a view to escape from liability. Therefore, learned Magistrate was justified in not relying upon the evidence of the petitioner.

14. As regards the assessment of the income, the petitioner has not stated in his written statement that he is unemployed and has no income. In his oral evidence, the petitioner has stated that he has no income and is staying in temple. It is submitted by learned advocate Mr. Rathod that as the respondent did not adduce any evidence to prove income of the petitioner, no maintenance could be awarded. Learned advocate Mr. Pancholi submitted that it is for the petitioner to show his income as he would be the best person to know and as he has not produced evidence

in that regard adverse inference is required to be drawn. He has relied upon the decision of **Ali Hossain V. Baby Farida Khatoon**, reported in **1998 Gr. L. J. 2762**, wherein Hon'ble Calcutta High Court has held that, **"When the husband is able bodied man, having capacity to earn does not care to disclose the income he is earning and wife does not produce any evidence in support of alleged income, omission on the part of the husband to disclose his own income was sufficient to warrant interference that he has capability of earning sufficient income to pay sufficient maintenance to wife and children."** and **Rajathi V. C. Ganesan** reported in **(1999) 6 SCC 326.** In the said decision the Hon'ble Apex Court has held that **"burden lies on the husband to prove that he has no sufficient means to discharge obligation or he did not neglect or refuse to maintain his wife."** The Court also held that, **"statement of wife that she was unable to maintain herself, would be enough. It would be for the husband to prove otherwise."**

15. As observed earlier, the petitioner has not produced any evidence to indicate his

income. On the contrary he has denied having any income. Therefore, in view of these decisions, the learned Magistrate was justified in assessing the income of the petitioner after considering various aspects and the learned Magistrate did not commit any error in determining the amount of of maintenance.

16. Learned advocate Mr. Pancholi has also relied upon the decision of **Induben Vrajlal Rabari & Anr. V. Vrajlal Ramjibhai Rabari & Anr.**, reported in **1993 (1) G.L.R. 396**, wherein this Court has held that, **"approach of the Court while considering plea of one who claims maintenance should be liberal and to that extent the provisions of Section 125 of Criminal Procedure Code must be liberally construed."** Mr. Pancholi has also relied upon the decision of Sushilaben Mohanlal V. Mali Chunilal Hargovind & Anr., reported in **1991 (1) G.L.H. 342,** wherein this Court held that **"while considering quantum of maintenance, expenses on food, clothing, shelter, medicines etc. ought to be borne in mind."** In the case on hand, the learned Magistrate has considered all these aspects and also

considered the fact that the respondent is undergoing treatment for burn injuries and she is required to incur expenses for the same. Therefore, learned Magistrate did not commit error in awarding the amount of maintenance.

17. Learned advocate Mr.Pancholi has relied upon decision of **Ushaben Ganpatsinh Barad V. Devendrasinh Ramsinh Raj & Anr**. reported in **1994 (1) G.L.R. 427**. This decision is in respect of exercise of power revisional u/s 397 and 401 of the Code of Criminal Procedure, 1973. As observed earlier while exercising revisional power this Court cannot reappreciate the evidence unless it is indicated that it has resulted into grave justice . In my view the petitioner has failed to point out that learned Magistrate committed grave error in appreciating the evidence and it has resulted into grave injustice. Therefore, this Court cannot reappreciate the evidence.

18. Learned advocate Mr. Rathod has relied on the decision of **Rekhaben Yogendrakumar Maniar & Anr V. State of Gujarat**, reported in **2004 (4) G.L.R. 2856,** in respect of quantum

of maintenance. In the said decision this Court has held that, **"at the time of grant of adequate amount of maintenance various facts and circumstances i.e. Income of a person under legal obligation to pay maintenance, status of family, other liabilities, if any, of such person and the socio-economic background of both the families i.e. family of the person under obligation and the family of the applicant who has approached the Court for maintenance, are required to be considered."** In this case, the petitioner has alleged that the respondent has done fashion designing course and has income of Rs.10,000/- p.m. but no evidence in that regard is produced by him. The petitioner has not pleaded that he has other liabilities. Therefore, the trail court was justified in reaching to the conclusion about the amount of maintenance.

19. Learned advocate Mr. Rathod has also relied on the decision of **Deb Narayan Halder V. Anushree Halder (Smt)**, reported in 2004 SCC 164, wherein Hon'ble Apex Court held that, **"the inquiry by the Court is restricted to the evidence on record and the case pleaded by the parties. It is not permissible to the court to conjecture and surmise and**

make out a third case not pleaded by the parties only to answer the query raised by any party". In the instant case, as the petitioner has not disclosed his income, it cannot be said that the trial court committed error in determining the amount of maintenance. Therefore, this decision is not applicable in the facts of this case.

20. Learned advocate Mr. Rathod has also relied upon decision of **Chandrapal V. Smt. Harpyari and Anr.**, reported in **1991 CRI. L.J. 2847,** with regard to means of husband to pay maintenance but in the facts of this case this decision has no application.

21. Learned advocate Mr. Rathod also for relied upon the decision of **Dasarathi Ghosh V. Anuradha Ghosh and Anr.** Reported in **1988 CRI. L.J. 64,** and decision of **Laduba V. Balwant Singh Bhimsang Rana & Anr.,** reported in **1991 (2)Crime 334 (Gujarat),** but these judgments are cited without any context and in the facts of the present case, these judgments are not applicable.

22. Learned advocate Mr. Rathod has

submitted that the respondent – wife could be awarded maintenance of Rs.1500/- to Rs.2000/- p.m. There is nothing to indicate that on what basis this amount has been arrived at. He has not been able to support his submission with regard to reduction in the amount of maintenance awarded by the trial Court. The petitioner has failed to point out that the impugned judgment is erroneous or perverse. Therefore, this revision application is required to be dismissed.

23. In the result this revision application fails and is dismissed. The order passed by learned 2nd Addl. Senior Civil Judge & J.M.F.C., Dahod on 21-4-2007 in Criminal Misc. Application No. 130 of 2006 is confirmed. Rule stands discharged.

(Bankim N. Mehta, J.)

/JVSatwara/